

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Promote Policy and  
Program Coordination and Integration in Electric Utility  
Resource Planning.

Rulemaking 04-04-003  
(Filed April 1, 2004)  
(QF Issues)

Order Instituting Rulemaking to Promote Consistency in  
Methodology and Input Assumptions in Commission  
Applications of Short-Run And Long-Run Avoided Costs,  
Including Pricing for Qualifying Facilities.

Rulemaking 04-04-025  
(Filed April 22, 2004)  
(QF Issues)

**COMMENTS OF INDEPENDENT ENERGY PRODUCERS ASSOCIATION ON THE  
PROPOSED DECISION ON FUTURE POLICY  
AND PRICING FOR QUALIFYING FACILITIES**

Douglas K. Kerner  
Ellison, Schneider & Harris, L.L.P.  
2015 H Street  
Sacramento, CA 95814  
Tel: (916) 447-2166  
Fax: (916) 447-3512  
Email: [dkk@eslawfirm.com](mailto:dkk@eslawfirm.com)

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Attorneys for Independent Energy Producers  
Association

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Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Independent Energy Producers Association (IEP) respectfully submits these comments on the proposed decision (PD) (mailed April 24, 2007) in the captioned matter.<sup>1</sup>

**INTRODUCTION**

Decisions by the Commission must contain separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision. Public Utilities Code § 1705. That requirement is not met by ultimate finding of public convenience or necessity; every issue that must be resolved to reach that conclusion is "material to the order or decision."<sup>2</sup> On the bases of these well established principles of law, this PD is fatally flawed.

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<sup>1</sup> The time for submitting these comments was extended to May 25, 2007 by an electronic ruling of the Administrative Law Judge sent May 4, 2007.

<sup>2</sup> *California Motor Transport Co. v. Public Utilities Commission* (1963) 59 Cal.2d 270.

Instances of this defect will be discussed below. As profoundly, however from a practical and implementation perspective, the PD lacks clarity in a number of ways that will prove problematic for the parties should the PD not be clarified. We discuss these as well.

## **DISCUSSION**

### **A. SCE's MIF Proposal Does Not Reflect Current Market Conditions.**

The PD concludes that the MIF shall be calculated in the manner proposed by SCE. PD at 62. Not included in the PD is an explanation of how that calculation will be made.

The PD criticizes one market approach because the market conditions underlying the data used in the regression analysis may differ from current market conditions in which case the resulting SRAC price may not reflect a utility's avoided cost. PD at 60. That same flaw exists within the adopted SCE proposal and SCE expert witnesses recognize this fact. In fact, the chance that the SCE approach, based on the record, will reflect avoided cost is small:

Q Are there any months in Figure 10 in which the price paid to the QF, the actual price paid to the QF, is the same as the indicted heat rate in the month – the implied heat rate month in which it's paid?

A Let me answer that in a – in maybe a little more of a – no.

20 RT at 2971.

Yet, the adopted SCE proposal does not include any better clarification on what precisely is going to be done to generate periodic short run avoided energy costs. In fact, the PD is opaque on the mechanism for figuring this out and, although necessary by SCE's reckoning, there is no provision in place for review or contest, by either the QF parties or the Commission:

Q Is there a provision in your protocol for a challenge or protest to the calculation made at some point?

A I don't think we have addressed level of detail. It seems that under normal commission practice it would be possible to contest an SRAC posting.

20 RT at 2968.

The PD is clear, however, that the MIF “will be calculated from a 12-month rolling average of historical North of Path 15 (NP15) or South of Path 15 (SP15) Day-Ahead (DA) market price data....” PD at 6. In support of this determination the PD argues that “data from the last 12 months represents an improvement over data from 1995 that is embedded in the Transition Formula.” PD at 61. IEP submits that in an effort to accurately approximate a utility's avoided cost relying on the notion that some number is more accurate than an antiquated number is not reasonable. Moreover, using historical prices to determine forward looking SRAC is inconsistent with the PD's own statement that “SRAC prices are designed to reflect the utilities' avoided costs over the forecast periods for which they are developed.” *Id.*, emphasis added.

#### **B. The PD Runs Afoul Of Current Law.**

##### *a. The PD Deviates from P.U. Code § 390.*

The PD fails to justify the deviation from current law, P.U. Code § 390, that even the SCE-approved approach admits is not satisfied:

Q Your SRAC proposal, as I understand it, is to continue to employ the transition formula under [Public Utilities] PU Code Section 390(b); isn't that right?

A No

Q You are proposing to apply some other SRAC pricing formula that's not in PU Code 390(b)?

A Our proposal is not the transition in 390(b).

Q So your proposal requires a legislative amendment to implement?

A It may, or it may require a Court of Appeals decision that declares 390(b) preempted.

IEP Opening Brief at 11.

*b. The PD Violates Federal Regulations.*

FERC regulations require utilities to publicly maintain, and to file with the appropriate State regulatory authority (i.e. this Commission), specific electric utility system cost data from which avoided costs may be derived. 18 C.F.R. §292.302. In proceedings conducted previously, there are admissions that the utilities have for years ignored this requirement. Federal regulations require the following:

(b) *General rule.* To make available data from which avoided costs may be derived, ... each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection ... the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatthour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years.

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

18 CFR § 292.302(b). IEP emphasizes the over-arching concept enunciated in the general rule above: QFs must be able to access utility system cost information so as to be able to determine the utility's avoided costs.

Furthermore, the FERC disclosure requirements cannot be overridden by the regulatory *fiat* of this Commission. The Commission does not have the authority to preempt federal regulations mandating public access to utility system cost information. In *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158 the court succinctly stated the preemption doctrine relevant to state and federal regulation:

A conflict will be found "where compliance with both federal and state regulations is a physical impossibility ...," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.*, *supra*, at 526, 540-541. Accord, *De Canas v. Bica*, 424 U.S. 351, 363 (1976).

As noted above, FERC regulations require public access to information used to derive utilities' avoided cost. The PD proposes to severely restrict market participants' access to data, including utility system cost data used to determine utility avoided costs. The PD's treatment of market participants' access to information must be rejected.



**C. The PD Does Not Explain The Determination Of The Proposed “Collars And Floors”.**

The PD adopts SCE’s proposed “Collars and Floors” without any explanation of how they will be determined or implemented. The PD does not explain how this might work and neither does the SCE proposal:

Q Am I understanding that correct that if there are four months in a row in which the collar is effected, then that would trigger an opportunity for someone to seek modification of the formula?

A That is what is being proposed.

Q In an expedited Commission proceeding?

A Yes, hm-hmm

Q Have you thought through how that expedited process would work, what sort of filing would have to be made and how our replies would work?

A Again, I don’t think that we have given it that level of detail... We don’t have a specific procedural proposal in that regard. It does seem to me that were the Commission to adopt this proposal, that the parties and the Commission could fashion something that was expedited for that purpose.

Q Maybe some kind of process amongst ourselves to figure out how to do that?

A Certainly I think it could be collaborative. In the event that  
didn't produce something mutually acceptable, the  
Commission could order something.

20 RT 2968-09.

The PD's approved SCE "collar" was hit in at least three instances even under SCE's proposal. The implementation exercise described by SCE already needs to be undertaken before the PD can take effect.

**D. The MIF Invites Market Power Abuse.**

The PD ignores and fails to explain that its approved MIF invites price manipulation by the purchasing utilities. The potential for buyer (the utility parties) market power, and the incentives to exercise it is profound. IEP/CCC/CAC Ex. 42 at 17-18.

Strategic generation or dispatch would entail the production of energy at times either to replace energy that would be purchased in the short-run energy market, or to add supply to the short-run market to suppress prices. Strategic behavior could take the form of substituting higher-cost retained generation or purchased energy for energy that would otherwise be purchased by the market. The effect is to increase the supply of higher-cost energy that would not normally be in the market to reduce the market-clearing price.

IEP/CCC/CAC Ex. 42 at 36.

The PD does not even discuss this critical issue that goes directly to the eligibility of the PD-approved MIF. The comprehensive assessment of the IEP/CCC/CAC testimony on this and other issues directed at the invalidity of the proposed market indices as "avoided cost" consists

entirely of “[w]e disagree.” PD at 53. That does not satisfy the requirements of the applicable statutes and case law regarding the Commission’s mandate to explain its findings and conclusions.

**E. The PD Does Not Adequately Explain Implementation of its own Proposal.**

As discussed above, the PD’s approval of the SCE methodology is incomplete with regard to practical implementation, as even SCE admits in the record transcripts cited. Further explanation or a collaborative process to define these details is required. Following, although not necessarily all-inclusive, are some of those details:

- How would the “collars” around the MHR be updated?
- How and how often would the collars around the MHR for PG&E and SDG&E be calculated?
- As discussed above, the adopted SCE proposal does not include a specific proposal for making monthly SRAC postings. When and how will that occur?
- The PD apparently approves of an “expedited” proceeding to reconsider the collars to the extent that they are hit in consecutive months as proposed by SCE. What procedure is proposed to accomplish that reconsideration?
- With regard to whatever SRAC posting protocol is used, what appeal or protest procedure will be used?
- Tables 4 and 4a describe an “adopted” heat rate of 7903 Btu/kWh. How is that value derived?
- Further to the prior question, are the heat rate of 7903 Btu/kWh and the O&M adder adopted values or merely illustrative as, apparently, are the assumed gas prices?

- The PD purports to adopt SDG&E's position on the variable operations and maintenance (O&M) adder of \$2.60/mwh. Tables 4 and 4a, however, indicate that the adder is \$2.47/mwh. How is the calculation shown in the tables calculated? When and on what basis is the escalation of the adder conducted?
- The PD apparently adopts use of a burner-tip gas price for calculating SRAC (PD at 64 et seq) while Table 4 refers to both a burner-tip and border price and, in the last column includes "either" as the appropriate multiplier. Which is correct?
- What are the transportation components used to build up a border price to a burner-tip price?
- For PG&E, what border price will be used to build up to the burner-tip price?
- Also for PG&E, is the backbone transportation component determined on a straight fixed-variable or modified fixed-variable basis?
- What is the process for calculation of the future value of ancillary services, a subtractor in the apparently adopted methodology?
- With regard to new or extended contracts approved by the PD, what process will be used to complain/protest of utility failure to provide those contracts, should that occur?
- The PD adopts time-of-day factors for each utility based on "their most recent RFO". PD at 68. Is that the last RFO prior to the adoption of the order or an ongoing reference? The PD is also unclear whether these TOU/TOD updates are to be updated only for energy prices, or also to the capacity prices. Additionally, to the extent a utility may use different TOU/TODs in its cogeneration and renewable RFOs, should it use the TOU/TOD it uses in the renewable RFO to set SRAC only

for renewable QFs and the TOU/TOD used in the cogeneration RFO for only the SRAC associated with cogeneration QFs? Or should the utility use the most “recent” TOU/TOD used in any RFO and without regard to technology?

- The indication in Table 4a to “as-available power” provided by QFs does not recognize that many, if not most, QFs provide power pursuant to firm performance obligations. Is the methodology applicable across all QFs irrespective of that distinction?
- The PD provides that a QF executing a new generation QF standard offer agreement shall assume SC responsibilities and also be liable for any CAISO imbalance and related charges. If the full amount of firm capacity is scheduled to be delivered, does the utility or the QF or neither have the right to bid some capacity into the CAISO’s regulation down ancillary services market? If so, which party retains the revenues the CAISO pays for the regulation down capacity award and/or if the CAISO calls on the unit to actually reduce generation? Who pays for the CAISO energy obtained to replace the generation reduction by the QF? How are the “savings” in gas costs (and potentially corresponding increase in gas supply and delivery fees and charges) allocated?
- The PD analyzes SRAC pricing within the context of the current CAISO regulatory system. Will the SRAC calculation require further modification once nodal pricing under MRTU is implemented? What are the possible implications on greenhouse gas emission regulation on the valuation of SRAC pricing?
- The PD requires that IOUs continue “to provide backup or standby power at reasonable rates to QFs, but declines to further address that issue.” PD at 131. Are

“reasonable rates” intended to imply a rate other than the utilities’ respective CPUC retail standby tariffs, separately negotiated “standby” rates, or at rates to be determined in the Distributed Generation Ratemaking proceeding?

- The PD enables “new” QFs to participate in the prospective QF Program and thereby to execute a “new QF generation” standard offer agreement. The PD should clarify that a “new” QF for this purpose is any QF which has never executed a CPUC standard offer QF agreement (i.e. this opportunity is not limited to only “new” QFs which will be constructed in the future). Furthermore, the PD offers a QF with a current QF standard offer agreement the ability to execute a new QF standard offer agreement. The PD, however, inconsistently suggests that a utility may negate the ability of a QF with an expiring contract to execute a new QF agreement. PD at 121.

This potentially inconsistent sentence should be revised as follows:

If a utility currently does not need additional QF power, for example, the utility is only required to enter contracts with new QFs if it chooses, and will not be required to purchase new QF capacity if the utility can demonstrate that it no longer needs capacity.

- The PD refers sometimes to the “QF Parties” but does not define that reference; in several instances the references do not represent the position of IEP, for example. To which parties does the term refer?

In the absence of clarity on these issues, it is impossible to satisfactorily evaluate the implications of the PD from an avoided cost perspective.

## CONCLUSION

For the reasons discussed above, the PD is not in a condition to be approved as drafted. Numerous questions remain both with regard to implementation of the proposal and with regard to the lack of explanation and support for the findings that the PD makes.

Respectfully submitted,



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Douglas K. Kerner  
Ellison, Schneider & Harris, L.L.P.  
2015 H Street  
Sacramento, CA 95814  
Tel: (916) 447-2166  
Fax: (916) 447-3512  
Email: [dkk@eslawfirm.com](mailto:dkk@eslawfirm.com)

Attorneys for Independent Energy Producers  
Association

### Certificate of Service

I hereby certify that I have this day served a copy of “Comments Of Independent Energy Producers Association On The Proposed Decision On Future Policy And Pricing For Qualifying Facilities” on all known parties to R.04-04-025 and R.04-04-003 (List QF Issues) by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on May 25, 2007 at Sacramento, California

\_\_\_\_\_/s/\_\_\_\_

Eric Janssen



Service List  
R.04-04-003/R.04-04-025 (List  
QF Issues)  
May 25, 2007

anogee@ucsusa.org  
roger@berlinerlawpllc.com  
lisa.decker@constellation.com  
jimross@r-c-s-inc.com  
toms@i-cpg.com  
pseby@mckennalong.com  
todil@mckennalong.com  
maureen@lennonassociates.com  
douglass@energyattorney.com  
berj.parseghian@sce.com  
woodrujb@sce.com  
janet.combs@sce.com  
michael.backstrom@sce.com  
daking@sempra.com  
gbaker@sempra.com  
cneedham@edisonmission.com  
phil@reesechambers.com  
mflorio@turn.org  
kpp@cpuc.ca.gov  
map@cpuc.ca.gov  
dwang@nrdc.org  
ek@a-klaw.com  
evk1@pge.com  
saw0@pge.com  
agrimaldi@mckennalong.com  
kbowen@winston.com  
jkarp@winston.com  
jeffgray@dwtd.com  
alhj@pge.com  
magq@pge.com  
ssmyers@att.net  
purves@grsilc.net  
rick\_noger@praxair.com  
wbooth@booth-law.com  
hoerner@redefiningprogress.org  
elarsen@rcmdigesters.com  
gmorris@emf.net  
jgalloway@ucsusa.org  
nrader@calwea.org  
tomb@crossborderenergy.com  
pcmcdonnell@earthlink.net  
wem@igc.org  
michaelboyd@sbcglobal.net  
joyw@mid.org  
brbarkovich@earthlink.net  
bill@jbsenergy.com.

hydro@davis.com  
grosenblum@caiso.com  
sford@caiso.com  
abb@eslawfirm.com  
dkk@eslawfirm.com  
atrowbridge@daycartermurphy.com  
mpa@a-klaw.com  
carlo.zorzoli@enel.it  
dgulino@ridgewoodpower.com  
bshort@ridgewoodpower.com  
sesco@optonline.net  
csmoots@perkinscoie.com  
jbwilliams@mwe.com  
myuffee@mwe.com  
rshapiro@chadbourn.com  
ralph.dennis@constellation.com  
dmcfarlan@mwgen.com  
brianhaney@useconsulting.com  
jheckdoyle@aol.com  
david.saul@solel.com  
chilen@sppc.com  
rprince@semprautilities.com  
hchoy@isd.co.la.ca.us  
dhuard@manatt.com  
pucservice@manatt.com  
curtis.kebler@gs.com  
sam@climateregistry.org  
mgibbs@icfconsulting.com  
case.admin@sce.com  
j.eric.isken@sce.com  
gary.allen@sce.com  
laura.genao@sce.com  
lizbeth.mcdannel@sce.com  
tory.weber@sce.com  
jyamagata@semprautilities.com  
dwood8@cox.net  
tim.hemig@nrgenergy.com  
kmelville@sempra.com  
gbass@semprasolutions.com  
liddell@energyattorney.com  
scottanders@sandiego.edu  
bpowers@powersengineering.com  
centralfiles@semprautilities.com  
cmanzuk@semprautilities.com  
irene.stillings@energycenter.org  
jkloberdanz@semprautilities.com  
dpapapostolou@semprautilities.com  
jleslie@luce.com  
lkostrzewa@edisonmission.com  
pherrington@edisonmission.com

jmcarthur@elkhills.com  
bjl@bry.com  
pepper@cleanpowermarkets.com  
chris@emeter.com  
mdjoseph@adamsbroadwell.com  
slefton@aptecheng.com  
diane\_fellman@fpl.com  
freedman@turn.org  
nao@cpuc.ca.gov  
filings@a-klaw.com  
nes@a-klaw.com  
rsa@a-klaw.com  
dickerson06@fscgroup.com  
ell5@pge.com  
mekd@pge.com  
mrh2@pge.com  
taj8@pge.com  
cem@newsdata.com  
bcragg@goodinmacbride.com  
jscancarelli@flk.com  
ren@ethree.com  
bobgex@dwtd.com  
stevegreenwald@dwtd.com  
ermd@pge.com  
cpuccases@pge.com  
mdbk@pge.com  
ecrem@ix.netcom.com  
l\_brown369@yahoo.com  
mecsoft@pacbell.net  
gx12@pge.com  
karp@pge.com  
nbb2@pge.com  
vjw3@pge.com  
k.abreu@sbcglobal.net  
mark\_j\_smith@fpl.com  
mhharrer@sbcglobal.net  
andy.vanhorn@vhcenergy.com  
alexm@calpine.com  
kowalewskia@calpine.com  
phanschen@mofo.com  
editorial@californiaenergycircuit.net  
mrw@mrwassoc.com  
mrw@mrwassoc.com  
mrw@mrwassoc.com  
rschmidt@bartlells.com  
janice@strategenconsulting.com  
chrism@mid.org  
sarveybob@aol.com  
gabriellilaw@sbcglobal.net  
rmccann@umich.edu

puma@davis.com  
demorse@omsoft.com  
brian.theaker@williams.com  
steveng@destrategies.com  
dougdpucmail@yahoo.com  
dreynolds@aspensys.com  
dcarroll@downeybrand.com  
etiedemann@kmtg.com  
kdw@woodruff-expert-services.com  
www@eslawfirm.com  
vwood@smud.org  
rlauckhart@henwoodenergy.com  
jesus.arredondo@nrgenergy.com  
karen@klindh.com  
pholley@covantaenergy.com  
rfp@eesconsulting.com  
dws@r-c-s-inc.com  
ppl@cpuc.ca.gov  
ayk@cpuc.ca.gov  
chh@cpuc.ca.gov  
djh@cpuc.ca.gov  
joh@cpuc.ca.gov  
jmh@cpuc.ca.gov  
mjd@cpuc.ca.gov  
mts@cpuc.ca.gov  
mkh@cpuc.ca.gov  
gig@cpuc.ca.gov  
rls@cpuc.ca.gov  
skh@cpuc.ca.gov  
sed@cpuc.ca.gov  
car@cpuc.ca.gov  
skg@cpuc.ca.gov  
sc1@cpuc.ca.gov  
tdp@cpuc.ca.gov  
tcx@cpuc.ca.gov  
tcr@cpuc.ca.gov  
tbo@cpuc.ca.gov  
snüller@ethree.com  
aulmer@water.ca.gov  
bmeister@energy.state.ca.us  
dks@cpuc.ca.gov  
kris.chisholm@eob.ca.gov  
mjaske@energy.state.ca.us  
wsm@cpuc.ca.gov  
mmiller@energy.state.ca.us  
rwethera@energy.state.ca.us